

Prasad (Migration) [2021] AATA 1471 (11 March 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Ravinit Rahul Prasad
CASE NUMBER:	1729657
DIBP REFERENCE(S):	BCC2017/2444648
MEMBER:	Hugh Sanderson
DATE:	11 March 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 11 March 2021 at 2:30pm

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – relationship has ceased – applicant suffered non-judicially determined family violence – have not lived together since 2017 – claim of family violence has not been established – court case dismissed – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5F, 65, 359 375A, 376

Migration Regulations 1994,rr 1.21, 1.23, 1.24, 1.25, 1.15 , Schedule 2, cl 820.211

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 20 November 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 10 July 2017 on the basis of his relationship with his sponsor, Deepika Prasad. At that time, Class UK contained Subclass 820. The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. Relevantly to this matter the primary criteria include cl.820.211 and 820.221 which require that at the time of application and decision, the applicant to be the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist. These include that the applicant, or a member of the family unit, has suffered family violence committed by the sponsor: cl.820.211(8) or (9) and 820.221(3)(a) and (3)(b)(i). The applicant claims this occurred in this case.
4. The delegate refused to grant the visa on the basis that the applicant did not meet cl.820.211(2) because the delegate was not satisfied that at the time of the application the parties were in a genuine and continuing relationship.

Background

5. The applicant is a citizen of Fiji and is currently 25 years old. The sponsor of the applicant was born in Australia and is currently 28 years old. It was claimed that the marriage between the applicant and the sponsor was arranged by the applicant's parents and the sponsor's grandparents who continue to live in Fiji.
6. The applicant was granted a Subclass 300 Prospective Marriage visa on 14 October 2016. He travelled to Australia on 14 November 2016 and the parties were married on 4 December 2016. In the application, in response to the requirement to provide relationship details the applicant simply wrote "TBA". In answer to the question of whether they had been living separately and apart, the applicant responded saying "Yes. Living apart since April 2017 resolving some relationship issue".
7. The sponsor provided a statement to the Department dated 10 July 2017 claiming that she was withdrawing her sponsorship of the applicant, stating that she had suffered domestic violence and the applicant had only come to Australia to marry her to get a visa. It is noted that the sponsor never signed the sponsorship forms for the grant of the Subclass 820 and 801 Partner visas.
8. An application for an apprehended domestic violence order was made by the police for the protection of the sponsor from the applicant. In a statement provided by the sponsor in support of that application, the following was claimed:
 - The applicant had verbally and physically assaulted her, including burning her with a clothes iron and a cigarette;
 - On 13 April 2017 the applicant slapped the sponsor and threw punches at her and assaulted her before they went downstairs for breakfast;

- When the sponsor went to collect the applicant after he finished work, he was not there and when she tried to call his number she got no response; and
- The applicant's mother telephoned the sponsor at about 7:00pm and abused her over the phone.

9. The applicant provided a statement dated 7 August 2017. In the statement he made the following claims:

- The parties had a good relationship while he was still living in Fiji;
- The applicant did not see the sponsor the first week he arrived in Australia but in the second week she took him to her home with her family;
- They didn't see each other again until their wedding on 4 December 2016 and then after a honeymoon in Brisbane they returned to live with the sponsor's family;
- Arguments started between them from about Christmas time with the sponsor refusing to go with the applicant to spend time with his relatives in Australia and the sponsor's father yelling at him and taunting him which made him scared and depressed;
- The applicant's cousin said that she would come and pick him up and when she arrived the sponsor's family home, they started yelling at her;
- The applicant heard the sponsor claiming that she would make false claims that he had assaulted her;
- The sponsor would often swear at and abuse the applicant as did other members of her family, and in particular her father who would also insult him and demanded money from him;
- After the sponsor agreed to try to find somewhere else to live with him, the applicant located a place in Mount Druitt, but when he told the sponsor's father he started to shout at the applicant and interfere more in the sponsor's life;
- The sponsor's father said that the applicant had to pay a large sum of money to him before he could move out of the home and because of this the applicant and sponsor were not able to move out to alternative accommodation;
- On 13 April 2017 the applicant received a call at work from his cousin who said that the sponsor's father had called him to say that he should pack up his things and leave the house;
- The applicant then reported this to the Kogarah police at 10:30pm;
- The applicant was then arrested by police on 20 April 2017 as a result of allegations made by the sponsor; and
- When the matter went before the court, the charges were dismissed as the magistrate did not believe the allegations made by the sponsor.

10. After a hearing before the Local Court at Mt Druitt on 4 July 2017, the application for the Apprehended Violence Order and the assault charge against the applicant were dismissed.

11. The delegate who considered the application was not satisfied that at the time of the application the applicant was the spouse, as defined in s.5F of the Act, of the sponsor. The delegate found the applicant did not meet the criteria in cl.820.211(2) and refused the application. It is noted the delegate did not consider whether the applicant met the criteria in cl.820.211(8).

Information to the Tribunal

12. The applicant provided further information to the Tribunal including his bank account details, photos which had been previously provided to the Department, the parties' marriage certificate and text messages between the applicant and the sponsor.
13. The Tribunal wrote to the applicant on 7 January 2021 inviting him to attend the hearing. The Tribunal noted the certificates on the Department's file pursuant to ss.375A and 376 of the Act, providing a copy of the certificates to the applicant. The applicant was invited to comment on the validity of the certificates.
14. The Tribunal noted the applicant was claiming that he had suffered relevant family violence. The Tribunal provided the applicant with the evidentiary requirements to establish a claim of non-judicially determined family violence pursuant to IMMI 12/116 and the associated explanatory statement. The applicant was requested to provide details of the evidence he was relying upon to establish a claim that he had suffered relevant family violence.
15. The applicant provided further information to the Tribunal including the following:
 - A card from Kogarah police station with an officer's telephone number;
 - Bank statement of the applicant; and
 - Payslips for the applicant from his employer.
16. The applicant's agent made submissions in respect of the claims made by the applicant. In respect of the evidentiary requirements to establish a claim that the applicant had suffered non-judicially determined family violence, the applicant's agent submitted the following:
 17. 1. Details of Police Complaint made by the applicant at Kogarah Police Station. The applicant reported the police since he was being ill-treated at sponsor's house by sponsor and her family members. Further he has intimated the police that sponsor and her family members are trying to trap him in false police cases.
 18. We will submit this document/details before hearing.
 19. 2. Letter from Solicitor Mr Hemant Prakash evidencing "Dismissal of Charge of Common Assault and Apprehended Domestic Violence" along with findings in that letter. Kindly consider the letter and its contents. The letter/findings clearly evidence that the applicant is subject of Domestic Violence and the sponsor has made false complaint on the applicant. Further the sponsor's family members have demanded \$80,000 from applicant. Further the sponsor agreed in cross examination that she was angered and frustrated and self inflicted the injuries. Further that the sponsor was desperate for reconcile but her father was against reconciliation. Further Her Honour Magistrate Carney said if the AVO was sought, then why did the complainant keep texting and talking with the defendant.
 20. We request your kindness to take the above evidences and consider that the applicant was actual victim of Domestic Violence.
21. It is noted the applicant's agent did not provide the letter from the solicitor who had been acting for the applicant in respect of the court proceedings.

22. The applicant appeared before the Tribunal by MS Teams video on 10 March 2021 to give evidence and present arguments. The applicant was represented in relation to the review by his registered migration agent who attended the hearing.
23. The Tribunal stated to the applicant that it would be putting to him information that would be the reason, or a part of the reason, for affirming the decision under review. The Tribunal stated that it would explain what this information was, why it was relevant and then invite the applicant to comment on or respond to the information. If he required more time, he could request an adjournment.
24. The Tribunal referred to the certificates on the Department's file pursuant to ss.357A and 276 of the Act. The Tribunal noted that the gist of the information provided were anonymous claims that the parties had been in a contrived relationship and the applicant's relationship with the sponsor had never been genuine. The Tribunal noted that the applicant had previously faced court proceedings that had been dismissed and accordingly the Tribunal placed no weight on the information on the Department's file which was subject to the certificates. The applicant and his agent agreed this was an appropriate way to treat the certificates.
25. The applicant provided details of his current circumstances. He said that he had not seen a doctor for any reason while he was in Australia apart from the "normal flu". He then said that he most recently saw a doctor because he broke his foot at work. He then said that he had seen a psychologist or somebody in 2017 on two occasions but could not provide any more details about this.
26. The applicant said that he had no continuing contact with the sponsor since he left the home on 13 April 2017. He said that on that day the sponsor's father had contacted his uncle and told him not to return to his home. He said that after he finished work at his uncle's place he went to stay at his cousin's in Kogarah. He said that on the advice of his cousin he made a report to the police that evening. He said that he had never gone back to the sponsor's home after that date. He was unsure where his passport was, but said that he thought that it was left at his cousin's place in Kogarah when he was living with the sponsor and her family.
27. The applicant then said that he returned to the sponsor's home and stayed the night with her on 14 April 2017. He said that all her family treated him well that night. He said that he did not see the sponsor's father as he was working, but the sponsor said that her father would treat him well. He said the next morning he found out that court proceedings had been taken against him and so he again left the home.
28. The Tribunal noted that the evidence of the applicant appeared to be that he had a good relationship with the sponsor and the only problem he had was with the sponsor's father. The applicant agreed this was true. He said that because of the problems he had with the sponsor's father he said to the sponsor that they should move out of the home and she agreed. He found a place, with the help of a relative, where he and the sponsor could live alone and she agreed to move out with him. He said that even the sponsor's mother agreed for them to move out. It was only when they raised it with the sponsor's father that the sponsor's father became angry and started threatening him. He said that he demanded money from him.
29. The Tribunal referred to the process under s.359AA of the Act referred to above. The Tribunal referred to the police interview of the applicant conducted on 20 April 2017. The Tribunal referred to questions of the police and the answers provided by the applicant. These answers indicated that the applicant did not have any problem with the sponsor, but any threats or concerns as to his welfare were from the conduct of the sponsor's father. If anything, it appeared that the sponsor was also bullied and intimidated by her father. This

was relevant as it indicated that the applicant had not suffered family violence committed by the sponsoring partner but, if there had been any family violence, it had been committed by her father.

30. The applicant initially responded by saying that he had no comment. He then said “there was not any domestic violence from Deepika (the sponsor), it was from her father.” The applicant was given further time to speak to his agent before the hearing continued. No further comment was made in respect of this information by the applicant.
31. The Tribunal asked the applicant’s agent to confirm the evidence the applicant was relying upon to establish a claim that he had suffered non-judicially determined family violence. The applicant’s agent confirmed it was the complaint made by the applicant to the police at Kogarah on 13 April 2017 and the report that the assault charge and application for an Apprehended Domestic Violence order made by the police on behalf of the sponsor had been dismissed.
32. The applicant said that he did not have any report from the police at this time, but only had a card indicating that he had seen the police. He said that he had been told that he would have to apply for the report from the police over the internet. He said that he had tried to do this last Friday but was told that it would take a month to get the report. The Tribunal noted that he had initially been invited to attend the hearing before the Tribunal in January 2020 and had been asked, at that time, to provide evidence in support of his application. That hearing was subsequently postponed due to the COVID-19 pandemic. The Tribunal had again invited him to attend a hearing on 7 January 2021, with a specific request that he provide evidence in support of the claim that he had suffered relevant family violence. Despite this, the applicant was stating that he had only taken steps to obtain this evidence the Friday before the hearing.
33. The Tribunal noted that if the applicant is to establish a claim that he had suffered non-judicially determined family violence he is required to provide two types of evidence. The Tribunal noted the information that was being relied upon by the applicant to establish that he had suffered relevant family violence. The Tribunal indicated that if the provision of the report the applicant made to the police on 13 April 2017 would make a difference to its ultimate finding, the Tribunal would contact the applicant and provide further time to provide this information. If the provision of that information would not make any difference in the ultimate finding of the Tribunal, then no further time would be provided and the Tribunal would proceed to a decision. The applicant and his agent agreed that this would be an appropriate course of action.
34. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

35. In the present case, the applicant claims the relationship with the visa sponsor has ceased, and he has been the victim of family violence.

Were the parties ever in a genuine relationship?

36. For the purposes of this decision, the Tribunal has accepted that the applicant and the sponsor were in a genuine relationship before that relationship came to an end not later than 15 April 2017. The Tribunal notes that the sponsor brought allegations that the applicant had assaulted her on 13 April 2017. The Tribunal notes further the applicant made a report to the Kogarah police on 13 April 2017 with allegations against the sponsor’s family. The details of the allegations made by the applicant to the police at that time have not been provided to the

Tribunal. The evidence of the applicant was that he returned to live with the sponsor, staying overnight on 14 April 2017 but then left again on 15 April 2017 and they have not lived together since then. The information the applicant provided in the application form was that he and the sponsor had not been living together since April 2017.

37. There is limited information as to the relationship between the applicant and the sponsor. In part, this is due to the fact that it was an arranged marriage and the parties were only living together for about four months. The Tribunal accepts, however, that the applicant and the sponsor were living together in the home of the sponsor's family. The applicant, with the consent of the sponsor, tried to find alternative accommodation for them however this was not achieved due to the objections of the sponsor's father.
38. The sponsor gave evidence that he had never suffered domestic violence from the sponsor, however, was abused and belittled by her father. The Tribunal accepts that this is an accurate description of the events in the home of the sponsor. The Tribunal accepts that the sponsor was also intimidated by her father and required to follow his dictates.
39. Although limited, the Tribunal has accepted, for the purposes of this decision, the claims made by the applicant that he and the sponsor were in a partner relationship and that this relationship has ceased. The issue that arises on the evidence in this case is whether the applicant has suffered family violence committed by the sponsor, within the meaning of the Regulations.

Family violence claims

40. Under r.1.23 of the Regulations, a person is taken to have suffered or committed family violence if there is evidence tested before a court; or the visa application includes a non-judicially determined claim of family violence, and either the Minister (or the Tribunal on review) is satisfied that the alleged victim has suffered relevant family violence or an opinion of an independent expert has been given that the alleged victim has suffered relevant family violence. Relevant family violence is defined in r.1.21.
41. In the present case the applicant is seeking establish family violence on the basis of a non-judicially determined claim of family violence.

Has a claim of family violence been made under the regulations?

42. Under r.1.23, a visa application is taken to include a non-judicially determined claim of family violence where either a joint undertaking to a court has been made by the alleged victim and alleged perpetrator or evidence in accordance with r.1.24 is provided.
43. The applicant in this case is seeking to rely on evidence referred to in r.1.24 – namely, a statutory declaration under r.1.25 and evidence of a type and number specified by the Minister for these purposes (see IMMI 12/116).
44. A statutory declaration under r.1.25 must be made by the spouse or partner of the alleged perpetrator. If the alleged victim is the spouse or partner, the statutory declaration must set out the allegation of family violence, name the person alleged to have committed the relevant family violence and if the *conduct* was not directed at the spouse or partner, name the person to whom it is directed and their relationship with the deponent: r.1.25(2).
45. The applicant has provided a statutory declaration dated 7 August 2017 claiming he suffered relevant family violence. In the form at question 3 where he was required to name the person who he alleges committed the relevant family violence, the name of his spouse is typed in and he has included, in handwriting, the name of his father-in-law. It is noted that during the

hearing before the Tribunal the applicant stated that he had not suffered domestic violence committed by the sponsor, but only by her father.

46. At question 7 of the form, where the applicant is required to provide details of the evidence he has of the family violence that has taken place, he only refers to his statutory declaration dated 7 August 2017 and a letter from his lawyer dated 5 July 2017. He refers to no other types of evidence to support the claim.
47. When the Tribunal wrote to the applicant on 7 January 2021 requesting that the applicant provide information as to the types of evidence he was relying upon to establish a claim that he had suffered relevant family violence, the Tribunal provided him with a copy of IMMI 12/116. In response to this, the applicant's agent submitted (which he then confirmed at the hearing) that the evidence the applicant was relying upon to establish a claim that he had suffered relevant family violence was the police report made by the applicant to Kogarah Police Station on 13 April 2017 and a letter from his solicitor who had acted for him in respect of the court proceedings which were finalised on 4 July 2017.
48. The letter from the solicitor who acted for the applicant in court proceedings which were finalised on 4 July 2017 does not meet the evidentiary requirements in IMMI 12/116. The proceedings were not commenced based on allegations that the applicant suffered family violence committed by the sponsoring partner. The allegations made were that the sponsor had suffered family violence committed by the applicant. Although the charge and the application for the AVO may have been dismissed, this fact does not support a claim that the applicant has suffered family violence committed by the sponsoring partner. The applicant did not seek any order against the sponsor or claim that he had suffered family violence committed by the sponsor in those proceedings and no finding was made that he had suffered relevant family violence.
49. A letter from a solicitor acting in those proceedings or the fact that the charge against the applicant and the application for the AVO was dismissed does not fall within the types of evidence set out in Schedule 1 of IMMI 12/116. The applicant's solicitor in respect of those criminal proceedings is not a person with the qualifications as required in IMMI 12/116 to provide the necessary evidence.
50. Accordingly, the Tribunal does not accept that the letter from the applicant's solicitor in respect of the criminal proceedings meets the types of evidence as required by IMMI 12/116 to establish a claim that the applicant has suffered relevant family violence.
51. Apart from the claimed report to the police, the applicant has not provided any further types of evidence to support his claim that he has suffered non-judicially determined family violence. The applicant claimed that he saw a psychologist in 2017, but he could not provide any details and did not seek to provide any report from this psychologist.
52. The only evidence of the claimed report to the police was a card from Kogarah police station identifying a constable and providing a phone number. No report, record of assault, witness statement or statutory declaration made by a police officer was provided. There was no documentation to identify the alleged victim, the alleged perpetrator and the details of any incidents of family violence.
53. Despite the Tribunal first inviting the applicant to appear at a hearing before it in January 2020 (with the hearing subsequently postponed due to the COVID-19 pandemic) and the Tribunal again writing to the applicant on 7 January 2021, specifically requesting the documentation the applicant was relying upon to establish a claim of non-judicially determined family violence, the applicant has done little to obtain any appropriate police record of the alleged family violence. He claimed that he made enquiries about how to obtain

such documentation the Friday before the hearing. The current documentation provided by the applicant does not meet the evidentiary requirements in IMMI 12/116.

54. The applicant requested further time to provide this documentation. The Tribunal does not consider that there is any utility in providing the applicant further time to provide this documentation. The fact is that even if the applicant does provide the necessary documentation from the police which includes the required details of the victim, perpetrator and the incidence of family violence, this would be only one type of evidence that meets the requirements in IMMI 12/116. As the applicant is required to provide two types of evidence as provided in IMMI 12/116 and the only other type of evidence being relied upon, being a letter from a solicitor confirming the dismissal of proceedings brought against the applicant the applicant, which is not one of the types of evidence specified in IMMI 12/116, the applicant has not met the evidentiary requirements in r.1.24.
55. Therefore, the evidence presented does not meet the requirements of r.1.24. As such, a non-judicially determined claim of family violence has not been made under r.1.23.
56. The applicant has provided no other evidence to establish a claim that he has suffered relevant family violence committed by the sponsoring partner. It is noted that in the hearing before the Tribunal the applicant specifically stated that he had not suffered “domestic violence” from the sponsor, but only from her father.
57. Given the above conclusion that the claim of family violence has not been established, the applicant does not meet the requirements of cl.820.211(8) for the grant of the visa. There is no evidence before the Tribunal that the applicant meets any of the alternative sub criteria. As the applicant does not meet an essential criterion for the visa, the Tribunal must affirm the decision under review.

DECISION

58. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Hugh Sanderson
Member